subject matter?

MR. YOHAI: Next is AGC as applied to the state laws, and I will try not to duplicate.

Your Honor, defendants believe that AGC is the proper test for antitrust standing and 14 of the 17 states in which plaintiffs have asserted state antitrust claim. This is important because under like the directs, the indirects have claimed under state law and they only claim under 17 states. If 14 of them are barred, they really don't have much left in state law claims. It's also important for every state that your Honor finds AGC applies, that's obviously less damages. It's significant to us. It's significant for both parties to understand which states are in and which states are out.

Nine of the 14 states that we argue AGC under have expressly an applied AGC. That's California, Iowa, Kansas, Michigan, Nebraska, North Dakota, South Dakota, Vermont and Wisconsin. It's very clear the courts in those states have applied AGC. Then we have five other states, which make up the 14, five other states that have harmonization statutes that say you must construe the state antitrust laws in accordance with federal law, and we contend that that would mean that AGC would also apply.

The DRAM decision at 516 Fed. Supp. 2d. 772 which I mentioned earlier today does this exact analysis and applies AGC in those 14 states. And we think that the DRAM decision is the only decision that carefully considered AGC in this context.

Now, plaintiffs will tell you about Judge Alsup's decision in the GPU case and they'll tell you about Judge Illston's decision in the LCD case, but what did those judges do. Judge Alsup said I'm not going to apply AGC unless it's clear that the highest court in the state would apply AGC. So he only applied it to a couple of states because the highest court in those states applied it. So he applied it in Iowa, and he also applied it in -- and he also applied it in Nebraska.

But he essentially ignored appellate decisions by courts in the other states that apply it, trial court decisions that apply it, without any discussions as to why. He just said we're not going to do the back-breaking labor to figure out whether it applies in these various states. He doesn't explain why he wouldn't do that and he does apply it in two of the states. In Flash, the judge applied it in four of the states. In LCD, the judge applied it in three of the states.

I would submit to you that if the state laws, if the state courts are applying AGC, there is no basis for a federal judge not to apply AGC absent some decision by a higher court saying we're not going to apply it. You can't pick and choose and say, oh, we're not going to apply it at all when the only cases discussing actually apply it.

That's why we think all 14 it should absolutely be applied. In addition, it should be applied on the state consumer protection statutes in Nebraska and New York because they have said --

THE COURT: Is that in addition to the 14?

MR. YOHAI: Yes, in addition to the 14. In Nebraska and New York there are state consumer protection statutes where the state courts have said, and I quote first from Nebraska (As read): The standing requirements for an antitrust claim under the Consumer Protection Act should be the same as an antitrust claim under the Junkin Act. And then similarly in New York they apply the same tests. So for that reason, too, they would apply AGC.

So once you have the analysis of as to why AGC should apply to the states, then you go to, well, how does it apply, and that I think has some similarities to what I discussed earlier today. I'm not going to repeat

all of it, but the key, the number one factor is antitrust injury, whether the plaintiffs' injury is of the type that is sought to be redressed by the antitrust laws. You also have directness of the injury -- these are the AGC factors -- the speculative measure of the harm, the complexity in apportioning damages, and the risk of duplicative recovery. Those are the factors, the five factors, as set forth by the Ninth Circuit in the Bond case.

So I'd like to talk about those factors. Antitrust injury, first factor. The indirect plaintiffs, unlike the direct plaintiffs, run into a square allegation again them. They write in paragraph 227 that there is vigorous price competition in the TV market. That's their own allegation. We didn't tell them to put that there. It's in their complaint. If there's vigorous competition in the TV market, they're all purchasers of the TV, they're not purchasers of CRT, the indirects are purchasers of TV. So if there's vigorous competition in the TV market, that's really the end. And, again, this is squarely from their complaint.

DRAM acknowledged these problems in the DRAM case. They said, look, in our current environment in the world a lot of markets can be said to be related. Here they try to relate the CRT's and the TV's. That's

not the way we should analyze it. The question is are they in the same market, not are they in a related market.

And the test for whether they're in the same market is are the products reasonably interchangeable and is there cross-elasticity of demand. Reasonably interchangeable. TV's and CRT's are not reasonably interchangeable. You can't watch a CRT tube. Nothing would happen. You could set it on a table, but you're not going to watch any TV programs. They're not reasonable interchangeable and no one would even seriously argue that they are. The fact that they're in related markets is not relevant. And that's what DRAM held.

Also, let's look at the remoteness factors. The indirect plaintiffs have more problems than the direct problems further down the chain. They have no direct purchasers, according to the directs they have some direct purchasers. The indirects have no direct purchasers. They're all indirect plaintiffs and there's multiple layers, as I was saying earlier today. Somebody, Panasonic can buy a CRT from someone, put it in a Panasonic TV, sell it down the chain, sells it to Best Buy. They're not even Best Buy. They're the consumer who buys at Best Buy. So there's problems

figuring out where was the pass-on in all these various layers. Was it from the original sale of the CRT? Directs say that's the overcharge right there, the original sale. Okay. Well, that's the overcharge. Did that then get passed down to the next layer in the chain? Did it get passed down to the time when Best Buy bought it? Maybe, maybe not. How about when the consumer bought it from Best Buy? Did it get passed down all the way to the last level, to the consumer level? Not clear.

All these things, all these problems are reasons why courts have found under AGC that there does reach a point where the injury is too remote and you're not going to be able to figure out how much of the overcharge was passed on there through all these various layers.

In fact, there's question whether there was injury at all. It's speculative. Given the CRT was merely a component of the TV, obviously there are other factors that go into building a TV. It's not clear. The speculative nature of the damage is important there, too.

Finally, you have the issue of duplicativeness. The directs are saying they're entitled to the overcharge. Well, if the overcharge was at the direct

portion of it, a retailer when a retailer bought it, how could it also be when the retailer then sells it to the consumer? It can't be both. If you paid too much at the retailer phase, then they should win. If you paid too much at the next phase, then the indirects, but it can't be both. So if they're saying the overcharge was when the directs purchased, the indirects should have no claim.

Finally, your Honor, the indirects spent pages and pages telling you about the Lorix case in Minnesota and how that applies AGC and why that's important. But we're not challenging Minnesota. Minnesota is one of the three states that we are not challenging because there is a high court there that says that AGC does apply. So that entire discussion, I don't know why it consumes pages and pages of their brief, is irrelevant to the states that we're talking about which I've listed for you.

In sum, your Honor, AGC should apply. There's no reason not to apply it. The courts in those very states have applied it, and it should apply to bar the indirect claims.

MR. CORBITT: Thank you, your Honor. Craig Corbitt again for the indirect plaintiffs on this issue.

DRAM is another case I happen to know quite a

bit about from being involved in it quite a bit. So I'd like to point out the current procedural posture of that case and then get down to what Judge Hamilton actually ended up deciding there.

There were two motions. There was an initial motion to dismiss that was granted. It actually was a 12(b)(3) motion after several years into the case and after quite a bit of discovery had taken place already, not a motion made at the outset like is being made here, and Judge Hamilton granted that motion holding that, first of all, AGC applies to all these various states and that in applying those factors the balance tipped in favor of the defendants. And I think she held four out of the five of them they went for the defendants.

There then was an amended complaint. We made a motion to amend the complaint which the judge granted, filed an amended complaint which contained at least in terms of antitrust injury and the pass-through factors, and I'll now get to the importance of this vigorous competition allegation in a minute because we've heard about that several times today and how that's supposedly inconsistent with our injury.

The second time around Judge Hamilton again granted the motion, however, she said that, and I'll quote here from 536 F. Supp. 2d. 1129. It's actually on

page 1149, I believe. (As read):

> The directness of the injury, the speculative nature of the harm and the complexity of apportioning damages, the court inclined to find that plaintiffs' revised allegations do sufficiently address the court's prior concerns and that these factors now tilt in plaintiffs' favor at the pleading stage.

She dismissed the complaint, however, because she believed that the antitrust injury requirement required the plaintiffs and the defendants to be in the same market and that by definition, I guess, because we are indirect purchasers in that case as well as this case, you can't be in the same market because there are levels of intermediaries in between.

There then was a 1292(d) motion in which the court granted finding that there was a substantial ground for a difference of opinion and that it was not all certain that she was correct. The case is now on appeal in the Ninth Circuit. It has been briefed, but no argument date has been set. The California Attorney General filed an amicus brief supporting the plaintiffs' position in that case and said that Judge Hamilton had gotten the law completely wrong at least with respect to California.

Why do I go into DRAM at such length here is because that's really the only case they've got that they rely on. You know, counsel talks about decisions in all these other states. The only ones I'm aware of that actually got to an appellate level there was the Minnesota Supreme Court case which said that AGC does not apply, and that was one of the cases arising out of the Visa and MasterCard tying litigation where the allegation was that anyone who went into the store and bought a product, the price of a pack of gum was raised by some incremental amount because the purchaser had to pay a fee to the banks supplying the Visa and MasterCard because they were forced to carry the debit card as well as the credit card.

The Fourth Circuit in the Microsoft litigation held that AGC does not apply at least in the courts within that jurisdiction, which includes North Carolina, and I presume that's why they're not moving with respect to North Carolina in this case.

So here again, though, as with the FTAIA, although we don't think AGC applies at all, the end result is that it really doesn't matter in terms of the end result because whether or not AGC applies, the fact that AGC does apply or doesn't apply, if your Honor finds that it does for any or all of these states, then

the question is whether it is appropriate to dismiss the complaint that alleges all these state law allegations at the pleading stage, and we think that Judge Alsup and Judge Illston and Judge Armstrong recently in the Flash Memory case, all of whom reached opposite conclusions from Judge Hamilton, got it right; and Judge Alsup in particular said that it's not appropriate for a federal judge when the law is not clear in these various states to just in an ipsa dixit fashion decide what that law ought to be and make a determination at the outset of the case, that in fact it's going to depend in part on what the proof shows exactly how remote the indirect purchasers claims are and how difficult it to be to prove damages and so forth.

Now, the allegation that there is vigorous competition in the OEM market and the retailer market with Best Buys and so forth, yes, we do allege that and that is not all inconsistent with injury to the consumers. In fact, as a matter of economics, that allegation that there is vigorous price competition at the intermediate level means that there is going to be pass-through of an overcharge from the top level down to the bottom level; and the defendants, I don't know if they have already, but when they retain economists in this case to advise them, their economists will tell

them because that's in every standard economic textbook that studies these issues, that's how pass-through works.

We know that there is vigorous competition at that level, and we are not contending that there was any conspiracy among Dell and HP and Best Buy and all those people. We don't have to prove that. In fact, if we allege that, it might be inconsistent with what we were saying here, but, in fact, we say there's vigorous price competition because that shows pass-through.

THE COURT: That shows what?

MR. CORBITT: That shows pass-through of an overcharge. That's the reason of stressing the fact that there's vigorous price competition at the intermediate levels.

Now, the defendants' argument really proves way too much if you accept what they're saying. Indirect purchaser litigation as defined by the various state repealer statutes and in a couple of states decisions of the highest courts of the states that indirect purchasers have a right to sue, those cases, virtually all of them, at least the most significant ones that have been litigated in state court, involve component products. Two examples of that are the vitamin antitrust litigation and the Microsoft case.

In Microsoft, the allegation in California where there was a $1.1 billion recovery and the case went up, on the settlement at least, to the California Supreme Court and was affirmed. In that case the allegation was that as a result of Microsoft's conduct the people who bought computers that had Windows installed on it and Word and Excel installed on it paid more for their computers than they otherwise would have by virtue of Microsoft's unlawful conduct.

And under the defendants' analysis of AGC and what that case should stand for, it would have been impossible and that litigation never would have proceeded off of square one. And those arguments, you know, frankly, I don't think that the Microsoft would say, which litigates every other issue about as vigorously as anyone can, and their lawyers even thought that they could make that argument with a straight face. But that just would not have happened.

The argument that there is going to be some problem with duplicative recovery in this case, well, this is what indirect purchaser litigation is about, and the argument, the same argument was made to the U.S. Supreme Court in the Arc America case that states cannot be allowed to set their own laws and to do something inconsistent with federal law because that might, you

know, result in overpayment or mess up the system.

And those arguments have been completely rejected because the states are free to make their own laws and enforce their own laws in this area, as recently affirmed by the Yokoyama case in the Ninth Circuit that I talked about when I stood up here a few minutes ago.

The way it was historically done in these cases prior to the enactment of the Class Action Fairness Act, which I guess was about four years ago, was that the federal cases, the direct purchasers cases would proceed under the Sherman Act in state court and the indirect cases for the consumers would proceed under the various state courts. Particularly in California, there were many, many such cases -- your Honor may be familiar with them -- in the California Superior Court with complex litigation with Judge Kramer and Judge Pollack which essentially were just indirect purchasers' allegations of the same complaints that were asserted in federal court.

Now, the law has changed in terms of the jurisdiction of the federal courts because CAFA has created federal jurisdiction in diversity over claims that previously would only have been filed in state court. But that does not mean that the fact that state

cases that were in federal court that were in state court and now by virtue of CAFA are in federal court, that all of a sudden the plaintiffs in those cases lose substantive rights that they would have had previously under state law.

That is totally contrary to the Erie Railroad versus Tompkins doctrine and to the principles of the federal versus state jurisdiction and comity. You can't just import and apply federal laws and federal policies to say that state court statutes and state laws can't proceed.

I don't know that there have been -- I don't think there has been, although lawyers in this room may know of one. I don't know of any case yet under CAFA where there has been actually litigated all the way through to the end with judgments and a determination had to be made about how to apportion the damages, but the fact of the matter is under the law as it has existed in this country since Illinois Brick and since the state court repealer statutes were enacted in California in the 1980's, you could have, as I said, these parallel cases proceeding in both courts and it was at least theoretically possible for there to be duplicative recovery, not only by the direct purchasers who were not subject to the pass-through defense because

of the handover issue, but also that the indirect purchasers could recover in state courts.

It's now been criticized by the Antitrust Modernization Commission and others say we ought to change the law and make it so there is some sort of apportionment process in the federal court, but that hasn't happened and may never happened, but it certainly is not the case now.

But the short answer to the question of you would apply AGC in such a way as to bar an indirect purchaser claim because of the possibility of duplicative recovery is just a Catch-22. It can't be the rule. Otherwise, AGC would have the effect merely by virtue of a diversity law that brings indirect claims into federal court of barring an otherwise valid state court claim.

So for all these reasons, your Honor, Judge Hamilton's opinion, I submit, stands alone. There is no decision that we've been referred to of the highest court of any state that agrees with her, and those that have decided the issue at all, such as Minnesota, have gone the other way. The history of indirect purchaser litigation in state courts in the Microsoft cases and otherwise is completely inconsistent with the application of this rule, and we think that the

defendants' argument should be rejected.

THE COURT: Rebuttal?

MR. YOHAI: Just quickly, your Honor. I don't understand this argument about how something different would be going on in federal court than in state court. Our point is that the state courts would bar these claims, too, under AGC whether they were brought in state court or brought in federal court. Counsel says that he's not aware of any state appeals courts addressing these AGC issues. We cite them in our brief. The Iowa case from the highest court in Iowa, the Nebraska case from the highest court in Nebraska. Both supreme courts of those states. That's laid out in note 13 and 14 of our opening brief.

Counsel seems to have a problem with the procedural posture of the DRAM. He said something about 12(b)(3) where there was discovery taken or something. I read you from DRAM at 516 Fed. Supp. 2d. 1083. (As read):

> The standard applied by the court in treating a motion for judgment on pleadings is the same as that applied by the court in consideration a motion to dismiss under 12(b)(6).

And it then goes on to apply the standing

analysis under 12(b)(6). 12(b)(6) case, it's a pleadings case. I don't understand the argument of a procedure posture being an issue. The subsequent decision was also on the pleadings.

Finally, your Honor, counsel says that it's not inconsistent to say there was vigorous competition because there was pass-on. I would submit to your Honor, well, there there's vigorous competition not only amongst CRT TV's, but amongst TV's, LCD TV's, plasma TV's, and CRT TV's, that whatever the pass-on argument is, the TV pricing if, as they say, it is competitive and all these things are coming to bear, the TV pricing is going to be a competitive market. So the fix in the CRT market, if there is one, would in a sense be irrelevant to the TV market if there is vigorous competition coming from these other products which have nothing to do with CRT's. They all compete. They're interchangeable.

So for those reasons and others, I think the AGC argument here is very much a winner for us on various states and that you can't just apply -- we're not federalizing it at all. We're saying look at the states' laws. The states themselves would bar these claims. Thank you.

THE COURT: All right. Next argument for the

moving party defendants.

MR. KESSLER: I think the state law claims would be next.

THE COURT: What issue are you going to talk about?

MR. KESSLER: This is state-by-state value of claims, not AGC, just based on each state's requirements.

MR. SCARBOROUGH: Good afternoon, your Honor. I'm Mike Scarborough with Sheppard Mullin here for the Samsung SDI defendants, and specifically the issues we're going to be talking about are listed in issues three, four and five in the statement of issues to the joint motion to dismiss the indirect complaint and I believe that also tracks in the table of contents in the briefing.

The first one we want to talk about the retroactive application of Illinois Brick repealer laws.

MR. SAVERI: Are we talking about the directs now again?

THE COURT: Yes.

MR. SCARBOROUGH: Yes.

THE COURT: So you're going to talk about the insufficiency of the pleadings in each of the states.

MR. SCARBOROUGH: That's right. We talk about

the Illinois Brick repealers and then various procedural and substantive defects with the Consumer Protection Act.

THE COURT: That's the portion beginning roughly at page 20 of your opening brief?

MR. SCARBOROUGH: That's right, your Honor. We've been talking today about the Illinois Brick repealer laws that have enabled the indirect plaintiffs to bring their claims, and some of those repealer statutes were passed during the time period that's at issue here going back to the mid '90's.

We've looked carefully at those repeater statutes and three of them are real problems for the plaintiffs in that it's very clear under Hawaii, Nebraska, and Nevada law that you can only apply those statutes prospectively. You can't do it retroactively.

In Hawaii there is a Supreme Court case, Supreme Court of Hawaii case that's directly on point and says you can't apply this statute retroactively and, in fact, the plaintiffs have conceded that point. In Nebraska and Nevada, there is very similar authority.

In Nebraska, the Supreme Court of Nebraska has said very clearly that a legislative act operates only prospectively and not retroactively unless the legislative intent and purpose that it should operate

retrospectively is clearly disclosed and that's the ConAgra case at 653 Northwest 2d. 655 and 658, and that's from 2002.

And there is nothing in any of the authority that plaintiffs have cited to us that would disclose such an intent. Instead, what we have is a couple of cases that are completely distinguishable. We've got one where the Nebraska --

THE COURT: I don't want you to go through every one of the cases and argue the cases. You focus me on what the arguments are and your position, and you've done that here by pointing me to pages 20 to 21. When plaintiffs get up to reply, I just want them to give some citation and case authority.

MR. SCARBOROUGH: I'm happy to move it along.

THE COURT: You don't have to go through this case by case by case.

MR. SCARBOROUGH: Well, my point, your Honor, is simply that we've got a clear mandate from the Nebraska Supreme Court that says you have to have a clear legislative intent to apply retroactively. We don't have it. It's the same thing in Nevada. That case is cited in our brief as well. We don't have it here. That takes care of the retroactivity issues.

The next issues pertain to plaintiffs' consumer

protection claims, and in both Hawaii and Rhode Island there is an issue that broadly pled a class that would apply to both natural persons and to business entities. Both of those statute are clear that the only persons who can make claims are natural persons and all those people have to be making those purchases for personal, family or household use. So any claims that don't fit into that definition have to be thrown out and the class definitions have to be restructured to eliminate all of those business entity claims. That's a problem with both Hawaii and Rhode Island.

THE COURT: Okay.

MR. SCARBOROUGH: Okay. With respect to Massachusetts, we've cited authority that says before you make a Massachusetts consumer protection claim you've got to file a precomplaint written demand that specifically says what the problem is, gives the defendants an opportunity to cure.

The plaintiffs haven't disputed that that's a requirement under that claim. Instead, they've said that we don't -- we're exempt from that because defendants haven't shown that they maintain a place of business or keep assets in the state.

Well, what they're trying to do is qualify for an exemption in the statute. They're trying to throw

the burden back on the defendants to say you've got to prove that and show that. Well, those facts are not alleged anywhere in the complaint and in fact what is alleged in the complaint is really the obverse. They've said that defendants engaged in trade or commerce in Massachusetts and that they sold, distributed or obtained products this Massachusetts, and all of that suggests that at the very least plaintiffs need to replead to show that this exemption somehow applies or they've somehow complied with the written demand requirement. They haven't done either one of those.

With respect to the New York consumer protection claim, there's really two separate problems there. One is that they've really not alleged deceptive conduct. We touched on this in context of the statute of limitations argument, some of the other arguments as well.

Very briefly, the case law which I encourage your Honor to review, we've cited quite a few different cases, including many from New York, that talk about price fixing, talk about the mere fact that you had a price fixing case does not inherently mean that it's deceptive, and the fact that you've concealed the existence of the conspiracy from the plaintiffs does not equal deceptive conduct.

There is really nothing more than that alleged here than that there was a conspiracy and defendants didn't tell us about it. So that's one of the problems with their New York consumer protection claim.

The other is that they have not alleged that this so-called deceptive conduct was directed at New York consumers. We have one very vague statement on which the plaintiffs rely and they quote in their brief that says (As read): Defendants collectively made public statements about the price of CRT products that defendants knew would be seen by the New York plaintiffs.

Number one, that doesn't say that it was directed at the New York plaintiff, which is required under the law. The second part is it's completely vague as to what that statement was. If it's a specific statement that it's reasonable to believe a New York plaintiff would have seen, what is it? What's the context of it? At least a general description of in the world they're talking about. We don't have any of that.

Finally, on the consumer protection claims, Rhode Island has a very specific statute that lists certain practices that are proscribed by it, and if you don't fit within -- there's about 19 different specific practices. If you don't fit in any of these buckets,

you don't have a claim. And we cited a case from the Rhode Island Supreme Court that says these types of claim, an antitrust conspiracy claim, does not fit in the bucket; and, therefore, it doesn't -- it is not an actionable claim under the statute.

Moving on to the unjust enrichment claims.

THE COURT: Hang on one minute. All right.

MR. SCARBOROUGH: And that Rhode Island case is the Barbra Streisand case, ERA Max. Moving on to the unjust enrichment claims, in three of the states we've cited authority to your Honor that say you have to show that plaintiffs conferred a direct benefit on defendants and those states are Michigan, Kansas and New York. And, again, this is the common law of unjust enrichment in those states.

So we cited cases to that effect, and what we got in return from plaintiffs in their opposition was a citation to lots of different cases that say you don't need privity of contract for an unjust enrichment claim; and that's not something we disagree with them with. That is in fact the law in those states, and that's fine.

We're making a different point. We're saying you have to confer a direct benefit on the defendants. Otherwise, you have no claims.

And the context of the types of cases that plaintiffs cited back to us were, they're all basically subcontractor cases where a subcontractor didn't have a contract with the homeowner but nonetheless they were able to state a claim because they had conferred a benefit directly on the homeowner, whoever owned the property. And that was simply a recognition that you don't need privity of contract, but you do need a direct benefit conferred. So that's in effect with respect to Michigan, Kansas and New York. Okay?

THE COURT: Uh-huh.

MR. SCARBOROUGH: A more fundamental problem with some of the unjust enrichment claims in specifically Massachusetts and Rhode Island is what the plaintiffs are trying to do is they're trying to get around those facts haven't passed Illinois Brick repealers. They're trying to do an end run around Illinois Brick. We cited legion cases saying that you can't do this. Those include the Terazosin case, the Microsoft case LCD, we just went through this, GPU, New Motor Vehicles, Kaydour. In all those cases they said you can't replead what is fundamentally an antitrust price fixing claim, dress it up as unjust enrichment claim and bring it an indirect purchaser in court in a state wherein direct purchasers are barred. That's the

claim under Massachusetts and Rhode Island law.

And really that same principle should apply with respect to the AGC argument that Mr. Yohai was just talking about. To the extent that your Honor finds that the antitrust and consumer protection claims under the states that he had identified, that those claims have to fall, then you can't allow an unjust enrichment claim that is fundamentally the same to proceed when those states have decided you can't go forward, these consumers don't have standing to pursue a claim. It's the same principle that applies with respect Illinois Brick.

And then finally my last point, your Honor, is that we cited a U.S. Supreme Court case, the Carol Hollius (ph) case that says when you have a statute that provides an express remedy that you've got to be really careful before allowing additional remedies under common law, and that really those express remedies should be it absent some sort of extra intent to provide additional remedies.

And what plaintiffs said in response to that is they gave us a string cite of cases that said under the laws that we're suing under these remedies cumulative, but if you look at -- if you actually go and look at those citations, that's not what they say at all. They

say things like the remedies provided in this section, under this consumer protection law are cumulative within that section. They don't say they're cumulative of any other remedies that may be out there under any other laws, and I can go through them.

That's the case with Hawaii, and Kansas and Nevada and West Virginia, and that's generally the types of citations they've provided to your Honor. I point also out they haven't provided any citation at all for Nebraska, North Carolina or Wisconsin claims.

So I'll leave it at that for you, your Honor.

THE COURT: Thank you.

MR. ALIOTO: Mario Alioto. I'll be responding. I wonder if we could take a short break, just two or three minutes.

THE COURT: All right. Bio break. 3:00 o'clock, please.

(Recess taken.)

THE COURT: Okay, Mr. Alioto. Let's go.

MR. ALIOTO: Thank you, your Honor. I'll be responding on the state law claims and summarizing our arguments only, your Honor. I'm not going to reargue what's in the brief.

THE COURT: Thank you.

MR. ALIOTO: Three states we have a

retroactivity issue. We've actually narrowed this down to two states. Hawaii, we have stated in our papers that we concede that there is no retroactivity in that statute. We're not going to be making any claim for retroactivity under the Hawaii statute.

Two remaining states, Nebraska and Nevada, we are claiming retroactivity. The argument under -- with respect to the Nevada statute is simple. We rely on the Pooler case, P-o-o-l-e-r, cited and discussed in our brief. Right on point. It's the last pronouncement on the subject, and that's the basis for our argument that it's retroactive.

With respect to Nebraska, counsel posed that as an issue of statutory interpretation. Retroactivity. It's a little slightly different than that, your Honor. It involves a chronology, an understanding of chronology and here's the important points.

You have two statutes, two Nebraska statutes that we have sued under. Those statutes provided relief to indirect purchasers. They've been on the books in that state for quite some time. One dates back to the 1900's. The other dates back many, many years as well. They provided for relief for indirect purchasers.

The law changed in Nebraska not because of any pronouncement by the Nebraska legislature but because of

the Illinois Brick decision. That happened in 1977, I believe. 1977. So that was the change in the law. Had nothing to do with Nebraska passing any enactment. Had to do with that Supreme Court case.

Some years later Nebraska passed a repealer. They said, no, we want to go back to the law as it was. We want to give indirect purchasers the right to sue under these statutes. So that repealer, it's not really a new statute, your Honor. It's not really giving a cause of action. It's reinstating something that existed under those statutes in the past.

If you look at these arguments in terms of that chronology, I think we'll get to the right result there. These claims are made in these types of cases, this Nebraska claim retroactivity going back all the way to 1996. This is being raised in the SRAM case. It's a live claim in that case, it survived and it should survive in this case.

With respect to consumer protection statutes, there are three at issue, Massachusetts, New York and Rhode Island. The Massachusetts challenge is just a simple technical requirement that a demand must be made upon the defendant as a condition precedent to bringing the suit. The statute itself recites that there is no need to make that demand if the defendant does not

maintain an office or hold assets in the state. So the whole question here revolves around whose burden is it to show that.

We contend, and we have case authority that supports the proposition, the defendant has to show that. They have to show that. That's information within their knowledge and that's their burden to show it. If they show it, we would have to do a demand. There is no evidence of that anywhere in the complaint. We don't have to make a demand. The claim is fine as stated.

The respect to New York, I'm not going to go into the cases. I'm just going to tell you, your Honor, that those cases have been cited in three courts, four courts. Your Honor has heard during the course of this argument there's cases pending in the Northern District, all component cases, the LCD case, of course, the LCD 2 and the LCD TV, there's also the SRAM, static random access memory chips, and computers, graphic processing units, the units that give pictures in computers and whatnot, the flash memory case. These are all four cases pending in this district, all very similar to this.

The New York consumer protection claim has been sustained in all of those cases. To make this just a

little clearer, a little more precise, it's been raised, the challenge has been raised in some of those cases and not raised on other of those cases. The point being it's a live claim in LCD, SRAM, GPU, and Flash.

There have been dispositions on this issue very recently in those four cases, and we took our allegations obviously from the allegations in those cases. The theory is if they passed muster there, they should pass muster here.

Rhode Island, two issues, there is language in the statute there that it only applies to natural persons. That's conceded by us, your Honor. There is no challenge on that. We're not going to be making any claim for anyone other than a natural person.

Again, that battle has been fought. The briefs are very similar to the briefs that have been filed here, almost exactly the same authorities in LCD, SRAM and one other very current recent case outside of this district, the chocolate litigation, In re Chocolate Confectionary case. All of those cases have sustained the claim.

The three states having to do with a direct benefit and privity, Michigan, Kansas and New York. Michigan again sustained in LCD and Cardizem. Kansas we rely on the Babcock case. It's a case that says where

there is an element of misrepresentation, which we've alleged here, that there need not be any direct contact or direct benefit or privity.

And finally New York, again been briefed, the issue whether you can bring an unjust enrichment claim under the law of New York has been briefed and claims have survived in the following cases, LCD in this district, Flash Memory and SRAM.

Finally, unjust enrichment. The argument by the defendant is under the antitrust statutes of Massachusetts and Rhode Island, there is no claim for an indirect purchaser. They have not enacted an Illinois Brick repealer. So as the defendant argument goes, since there is no claim under those antitrust statutes, you can't backdoor it and go and try and get the same thing by bringing an unjust enrichment type claim.

The flaw in the argument is that the law of those two states recognized consumer protection claims under the consumer protection statutes of those states. So in that sense we're not backdooring anything. We're doing something perfectly consistent with the laws of the state -- with the consumer protection laws of the states of Massachusetts and Rhode Island.

Finally, unjust enrichment, the defendants argue that to the extent there are statutory remedies in

a number of states, I think they cited to 12 states in their brief, to the extent there are statutory remedies, those remedies are exclusive; and, therefore, you cannot bring an unjust enrichment claim.

Well, that's just contrary to the way things have been pled since time immemorial. The unjust enrichment claim is an alternate theory. It's a different theory of recovery. It existed in common law. The enactment of statutes that provide statutory relief and statutory remedies don't abrogate that whole body of common law, and we've cited cases that make that very clear.

The main case cited by the defendant, a Supreme Court case, is a Title VII case. It had to do with relief under Title VII which is vested in the government, and the plaintiff tried to seek relief under that act, a private right of action under Title VII that provided for governmental enforcement.

The court said we're not going to carve out or create new private rights of action. If statute says what it says and no private rights of action. It has nothing to do with the interplay between common law right to unjust enrichment and the statutory remedy for the same thing. There are two different remedies. We've pled them in the alternative. They go side by

side, and they're in all of these major recent cases as well, your Honor.

Thank you.

THE COURT: Any rebuttal?

MR. SCARBOROUGH: Very briefly, your Honor. On the retroactivity point, you know, it's a nice theory that was espoused as to Nebraska and Nevada, really sort of a policy argument looking back at the chronology of those states, but there is zero legislative history to support that. Defendants cited legislative history. We cited the Supreme Court cases from those states that says that's exactly what's required. It needs to be unambiguous. Otherwise, statutes are going to be applied prospectively only, and we don't have anything from the plaintiffs that fits that bill.

On the consumer protection claims, plaintiff say that they've got a Massachusetts case that shows that it's defendants' burden to show that exception to the demand requirement. There is no case to that effect. The case that they cited doesn't say that at all. In fact, the trial court said they didn't think that the demand letter was specific enough and the appellate court disagreed. There is no discussion of whose burden it is to show that whether or not the exemption applies, and we think by all logic plaintiffs

have got to have that in their complaint if they want to show they're free from an explicit requirement of the statute.

And then finally with respect to unjust enrichment, plaintiffs have cited nowhere in their opposition or today any Massachusetts or Rhode Island price fixing indirect purchaser claims, and they haven't because there aren't any and they routinely have been not allowed. There are many, many cases that we cited that have thrown out those claims in those states and other states wherein direct purchasers are not allowed to sue.

Thank you, your Honor.

THE COURT: All right. I think you have one more, do you not?

MR. KESSLER: The last joint issue is the statute of limitations on the indirect.

THE COURT: I'm not going to hear oral argument. I've heard the same argument, same principles with respect to the direct cases and you have addressed it in your briefs.

MS. KERN: Your Honor, if I could just be very briefly, I have some comments that.

THE COURT: On what issue?

MS. KERN: On fraudulent concealment.

THE COURT: And it's not contained in your brief?

MS. KERN: No.

THE COURT: In fairness I have to let you go, too.

MS. KERN: Thank you.

THE COURT: Let me finish what I was going to say. You have discussed the principles already of the sufficiency of affirmative acts to allege fraudulent, we're already discussed the inability to discover or whether there was ability to discover the true facts, due diligence and you also reviewed principles of constructive notice. We've already heard those already. So I was going to take my fix on this case, the indirect cases from your three briefs.

MR. ROGER: Perhaps if counsel would actually like to start, and I can reply to whatever new material.

MS. KERN: Thank you, your Honor. I'll try to be brief. I just have some slightly different points than the ones made. Silvie Kern from Glancy Binkow & Goldberg.

First of all, I want to raise two points that the defendants have not addressed in their briefs. One is that fraudulent consumer is a factual issue, and it's inappropriate to dismiss fraudulent consumer claims on a

motion to dismiss and a lot of cases state that we cited to those in our brief, Rubber Chemicals and so forth. There is no response from the defendants in their entire discussion on fraudulent concealment on that point.

The second point, equally important is there is not one mention of the LCD case in the fraudulent concealment discussion of the defendants, and the reason that that's important is the silence is very telling. In the LCD which, as the court has heard, involves a related industry and a lot of similar players and a lot of similar allegations, in LCD 1, because there were two opinions, in LCD 1, Judge Illston held that the -- well, let me backtrack.

Judge Illston had occasion to rule on the fraudulent concealment allegations of the indirect purchasers with respect to the state claims that they were making, and Judge Illston ruled that on a motion to dismiss that the plaintiffs had adequately alleged their fraudulent concealment claim, and she did so with respect to every single jurisdiction that's at issue here, and I will cite the specific parts of that. It's LCD 1, 586 Fed. Supp. 2d. at 1131 at notes 10 and 11. And those cite all the allegations -- I'm sorry -- all of the jurisdictions that we are -- under whose laws we are suing.

And Judge Illston specifically found that the plaintiffs had sufficiently alleged fraudulent concealment through allegations that the defendant had concealed through secret discussions through an agreement not to discuss publicly the nature of their agreement of price fixing and also, quote/unquote, numerous pretextual and false justifications disseminated to consumers regarding defendants' price increases.

Defendants don't raise any of this. By the way, in case there is any doubt, I want to point out to the court that LCD, both LCD 1, which is the case I've been referring to, and LCD 2, which dealt with a motion to dismiss after amendment and included discussion, both of those cases have been cited after Iqbal. So they are still good law. They were cited in In re Title Insurance Antitrust Litigation in May 2009 opinion. It's a case that the LG defendants have actually cited. And it's 2009 WestLaw 1458025.

Now, I want to briefly respond to the points that the defendants do make. First of all, the defendants cite to cases involving evidence. We're on the motion to dismiss here. Conmar, decided on appeal from summary judgment. Barker, decided on summary judgment. Coordinated pretrial proceedings in the

petroleum products case, decided on summary judgment; and particular to that case I want to make a couple of points because the defendants have mischaracterized that case. They state in their brief that the court there found, quote/unquote, adequate allegations of fraudulent concealment where the plaintiffs identified by name specific employees who instructed others on how to avoid detection, and they also say these allegations are precisely the kind of facts not pled by plaintiffs. That's joint reply at 209.

Well, that's an incorrect statement because that case was decided again on a motion for summary judgment, and the court did not rule on the basis of the allegations and it did not make that statement that I just read on the basis of the allegations. It was based on evidence including introduction of deposition testimony. And, further, that court, as I think we mentioned in our brief, that court held that a defendant has an extremely difficult burden to show that fraudulent concealment allegations are barred as a matter of law.

Now, the next one I want to make --

THE COURT: Didn't you cover that in your brief?

MS. KERN: I just want to distinguish a couple

of cases.

THE COURT: No, I've heard the standards, I'll reread your briefs. Don't worry about that. So I just don't want to take it any further about that.

MS. KERN: One point about Barker that they cited on their reply brief.

THE COURT: All right.

MS. KERN: Thank you. Thank you. The defendants cite Barker in their joint reply in Footnote 32, they say that the plaintiffs may not generally use fraudulent concealment by one defendant as a means to toll the statute of limitations, and I want to just briefly mention to the court that first that was a summary judgment case; second, in that case the defendants were defendants who were acting independently of one another, unlike here where the plaintiffs are alleging that there was an interconnection among the defendants.

And what I particularly want to point the court to is a case in which Barker has been distinguished on that basis, and that is Low versus SG Vendome, 2003 WestLaw 2567880 at star seven. And in that case this was a case that was brought by the Commissioner of Insurance involving the transfer of a junk bond portfolio, and the court held that the commissioner had

sufficiently invoked a fraudulent concealment doctrine as to certain defendants and it distinguished Barker, and it says in Barker the various defendants all were individuals with independent identities and responsibilities and none was alleged to have been acting on behalf of any of the others.

By contrast in Low, the plaintiff had alleged that the corporate defendants were under the control of one of the defendants.

So I raise that because that was a case that was cited by Mr. Roger and also in their reply briefs. So thank you for humoring me, your Honor.

THE COURT: Do you wish to reply?

MR. ROGER: Just very briefly, your Honor. Your Honor, the assertion is that fraudulent concealment should not be decided on a motion to dismiss and that we did not cite any cases for the opposite proposition. As I did note in my earlier remarks and as we've also cited in our reply brief, we've got the Rutledge case, which is a Ninth Circuit case, it is 576 F. 2d. 248, in which the Ninth Circuit affirmed the dismissal of a complaint based on inappropriate or insufficient pleading of fraudulent concealment.

So these are cases that can and should under the proper circumstances be dealt with on the pleadings

and the question is is this the proper circumstance.

Ms. Kern says, well, they didn't talk about the LCD case. Well, the LCD case is pre-Iqbal, and just because Judge Illston decided something in the LCD case doesn't mean for all time immemorial every plaintiffs' defendant in an antitrust case in the Northern District will survive examination. You've got to take a look at what the pleadings actually say.

And I would just commend to your Honor paragraph 290 of the indirect purchasers' complaint because it is there that they list the entirety of the fraudulent concealment allegations. That's the only place it is.

THE COURT: Again, please?

MR. ROGER: Paragraph 290.

THE COURT: What page is that?

MR. ROGER: That would be page 89, your Honor. So they say (As read): Defendants engaged in a successful illegal price fixing conspiracy which they affirmatively concealed in at least the following respects. And they've got a list of from A to J.

Well, I submit, your Honor, that is a checklist. That is not fact pleading sufficient even under Twombly and Iqbal, let alone Rule 9(b). This is the kind of list that you would give an associate who

you wanted to actually come up with a pleading and you say, okay, make sure that you cover all these bases, get me some facts that will survive examination, but that's not what we have in the complaint. We've got just the checklist. That's insufficient under 9, that's insufficient under Twombly.

And finally with respect to the Barker case, yeah, it's a summary judgment case, but so what? The court in Barker laid down the law as to when, whether for pleading purposes or for legal purposes or whether it's for jury verdict purposes when the actions of one defendant will be binding on the actions of another defendant, and the court specifically said that in fraudulent concealment circumstances the doctrine of fraudulent concealment tolls the statute of limitations only as to those defendants who committed the concealment. Plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statue of limitations against the other defendants.

THE COURT: You're using it as a statement of law. There are more cases that could be ruling on motion to dismiss.

MR. ROGER: Again, your Honor, we commend both in the case of the direct complaint and indirect

complaint what are the facts that the plaintiffs have alleged here. With that, I'll submit, your Honor.

THE COURT: All right. That will conclude the argument on the indirect cases. Let me ask how many people are present who want to speak on some aspect of the individual cases? All right. We're going to go into that. You will have at least a couple of hours to do that.

MR. MONTAGUE: As I mentioned earlier, I have some general remarks when the plaintiffs' turn is appropriate for the individuals.

THE COURT: How long do you think that will take?

MR. MONTAGUE: 15 minutes.

THE COURT: All right. You may have 15 minutes. I understand you're going to argue the general principles of Twombly and Iqbal.

MR. MONTAGUE: And the general outline of the individual plaintiffs as they -- individual defendants as they relate to that, yes.

MR. CORBITT: We're moving parties.

MR. LEHMANN: If you do that, you're going to hear Twombly argument eight times, wasting your time and ours.

MR. KESSLER: I would think at least what the

individual defendants are prepared to do is not to argue the legal standards of Twombly but to argue why there aren't particular facts relating to those individual defendants that are unique to them in these complaints that apply.

If you want to do a Twombly summary at the end, that's fine.

MR. MONTAGUE: The problem is you can't argue that without looking at the complaint as a whole. That's been the whole problem today. All these arguments have been totally disjointed from the complaint as a whole. We'd like to bring that all into context.

MR. SPECKS: One of the main arguments on the individual defendants' arguments is that we haven't satisfied Twombly. We really haven't had a chance to address that.

THE COURT: I'm going to do what I said I'd do. You may have 15 minutes to talk about Twombly and then we'll go to the other defendants, the defendants' individual arguments.

MR. MONTAGUE: May I do that now?

THE COURT: Yes.

MR. MONTAGUE: Thank you, your Honor.

Mr. Corbitt actually set forth exactly what the

plausibility tests are when he was talking about, and that's what we're talking about now, sir, whether our allegations are plausible to satisfy, A, general conspiracy issues and the involvement of each defendant.

And what Twombly or Iqbal did not do was change the basic tenets of pleading, and that is all of the facts, the facts are to be taken as true, all of our factual allegations are to be taken as true, not our legal conclusions and not our bare allegations, but factual allegations, which we have lots of.

All of the inferences are in our favor, but they don't seem -- defendants have not realized that. There is no heightened pleading standard and the allegations are to be looked at in their entirety. That's the point I'd like to make here, and I'd just like to set forth very briefly how we've laid out this case in allegations.

The first thing we did was we set forth the economic and industry structural standards that support the feasibility of a conspiracy and the defendants' motive. We set forth that it was a concentrated industry --

THE COURT: Well, you don't need to give me paragraph by paragraph.

MR. MONTAGUE: I'm not.

THE COURT: Focus me on the sections, would you, please?

MR. MONTAGUE: Actually, it's the one section I didn't write down the paragraphs.

THE COURT: You don't have to have the paragraphs.

MR. LEHMANN: There's the table of contents.

THE COURT: What section of the complaint should I read with particular attention?

MR. MONTAGUE: Actually, I do have it. I can give you the paragraphs that set this forth. It's paragraph 2 -- there are a lot of them. 2, 3, 105, 107, 108, 111, 112, 188, 189-90, 191 through 197.

THE COURT: That's the structure of the industry.

MR. MONTAGUE: That's the economics and the structure of the industry to show that, A, it is an industry that is conducive to price fixing and, two, that the defendants had a motive to price fix, and that goes not only to make sure that the prices were fixed and stabilized with respect to CRT, but for CRT products.

And I think that the best place on that, frankly, is the flat glass case in the Third Circuit, 385 F. 3d. 350 at page 361 where it says (As read):

Importantly, the demand for flat glass was in decline and the particular defendant and its competitors had excess capacity. Normally reduced demand and excess supply are economic conditions that favor price cuts rather than price increases.

THE COURT: Just go ahead with your complaint.

MR. MONTAGUE: Thank you. Then starting at paragraph 134, your Honor, we set forth factual allegations about the meetings and how the conspiracy operated, and these are clearly not conclusory bare facts. These are factual allegations about the 500 meetings, about when they began, they began informally and became formal meetings, that they were, quote, glass meetings and they had different levels of people that attended them, top management, management meetings, working --

THE COURT: Would you give me the paragraphs, please, so you don't have to read them all?

MR. MONTAGUE: It begins with 134, but the specific paragraphs when they began is 137, describing where they were held is 139, describing the different levels of management is 141 A, B, C, and D. We allege the type of information that the defendants exchanged, that's 142, we allege how the meetings were run. That's

143. We allege that they agreed what -- we allege what they agreed to at the meetings, including price guidelines, price ranges, price floors, known as bottom prices, both for CRT's and CRT products.

We cite 146 that they agreed upon outputs, 147 we allege that the participants were given price on projects and projected future output, new capacity and product lines.

We allege that, the next paragraph, what they said, what they agreed to say that their customers about their price increases; and in 151 and 152 we talked about their assignments to contact nonattendees.

And then in paragraph 153 we talk about how they monitored their prices down the chain line, how they monitored output restrictions. In paragraph 156, we allege how they gave pretextual reasons for their price increases. 191, 193, 195 and 153. And we allege that they had further opportunities to further conspire at trade associations and joint ventures.

We set forth that they had guilty pleas, that the same people who were indicted in CRT were indicted in LCD and gave guilty pleas, the identical people for Chunghwa, and they have both been held to be important factors in determining the plausibility.

We take all of these allegations of fact in the

complaint as true, your Honor, and making all of the inferences in our favor and viewing those allegations as a whole, the amended complaint satisfies the necessary pleadings standards with respect to conspiracy.

Now, a lot has been made about the CRT products, the television and the monitors. I just would like to call your attention, your Honor, to show that we did in fact allege a basis for that. We alleged a basis for that conspiracy. Their conspiracy did involve the prices of the televisions.

THE COURT: You allege that. I think it's clear. You wrote it in the complaint.

MR. MONTAGUE: We're discussing the meetings, and the point is that some of these paragraphs that were discussed were not discussed in the context that they're made as what was discussed at the meetings. And in 144 we say at the end (As read): Defendants also considered the internal pricing of products containing CRT's and agreement upon the prices at which CRT's are set.

At 146 we end up saying (As read):

> The analysis of prices for CRT's often included consideration of downstream prices for television, monitors and similar products and how they would affect the price ranges being collusively set.

So the idea is in the meetings they discussed both prices and how they affected each other. And then in paragraph 217 we said in conclusion (As read):

> Based on those particular factual allegations with respect to CRT products, defendants and their agents agreed inter alia, A, to fix target prices and price guidelines that related to CRT products.

And the last thing we did, and this will come up in each individual defendant's allegations where that individual defendant has a television or a monitor or a computer monitoring manufacturing facility, we say that those subsidiaries that did the manufacturing of TV's and monitors, they played a significant role in the conspiracy.

THE COURT: What are you reading from now?

MR. MONTAGUE: I'm reading from paragraph 158.

THE COURT: 158?

MR. MONTAGUE: But this is just a sample. This is included and repeated in almost every paragraph where we talk about an individual defendant who manufactures television and monitors. We say they played a significant role in the conspiracy because defendants wished to ensure that the prices for such products paid by direct purchasers would not undercut pricing

agreements reached at the various meetings.

So we've clearly showed and tied in a basis for saying why the prices of monitors and TV's CRT products were part of the conspiracy that also set the prices for CRT's. One could not work without the other, as Mr. Simon said.

THE COURT: What's your argument? These facts and applying the standard of Twombly and the standard of Iqbal, these are sufficient allegations?

MR. MONTAGUE: For the general conspiracy. Now, it's in this context that we now turn to the individual defendants. They can't just be looked -- you just can't look at the allegations for an individual defendant without looking at all of these particular allegations, because the first thing we do with each defendant is identify the number of meetings that they went to, and we do refer to them as family corporations because, and Mr. Kessler referred to paragraph 154, but he stopped reading.

He read the part where we said a representative of a family corporation went to the meeting, but not everybody from that family went, but he stopped reading where it says, starting in line 25 of paragraph 154. It says (As read):

The individual participants entered into

agreements on behalf of, and reported these meetings and discussions to, their respective corporate families.

That ties in everybody, everybody in the corporate family, and it makes sense because otherwise the totality of the conspiracy could not have worked.

Now, this district probably more than any other in the country has given us instructions on what pleadings are required for linking each defendant to a conspiracy, and I must say that after reading the Iqbal case carefully, that has nothing to do with this issue for this type of a conspiracy. The Iqbal case involved specific violations of a specific individual, not acting in concert with others. I'll get to that after we go through this.

The first case was the SRAM case which at 580 F. Supp. 2d. at 904, the court said that the defendants, quote (As read): Now only need to make allegations that plausibly suggest that each defendant participated in the alleged conspiracy.

And then in LCD 1, 586 F. Supp. 2d. at 1117, after the judge required -- Judge Illston required further amending, she said what the plaintiffs had to do. (As read):

Plaintiffs need not plead each defendants'

involving in the alleged conspiracy in elaborate detail, but must simply include allegations specific to each defendant alleging the defendant's role in the conspiracy.

And then after the amended complaint was filed she found that pleading -- allegations which are almost identical to those here, and it makes sense because these are related companies and the same people were involved, she found that to be perfectly satisfactory, and that was 599 F. Supp. 2d. at 1184.

And I think, your Honor, in Mr. Saveri's declaration he had an Exhibit 3 which compared the allegations in LCD to the allegations here. It may be very helpful to your Honor.

And by the way, the exact same allegation with respect to corporate families that I referred to at paragraph 154 was involved in the LCD decision and was accepted by Judge Illston as satisfactory. I'm not going to get into the individual allegations for each defendant.

THE COURT: No, they're here. I'm sure we'll hear about those in a moment.

MR. MONTAGUE: But if you take what we allege about each individual and put it in this setting, it is certainly plausible that this court, as the court said

in Iqbal -- as the court said in Iqbal (As read):

> The claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.

And Iqbal does nothing more than that. For the defendants to take any position that it has any effect on what -- there has to be greater pleading other than plausibility to connect a defendant is wrong because the detail that Iqbal required for the individual defendant here was not to link them to a conspiracy but because, as the court said, the respondent must plead sufficient factual matter to show that the petitioners adopted and implemented the detention policies at issue, not for neutral investigative reason, but for the purpose of discriminating on account of race, religion or national origin. So each defendant they basically had to allege a specific violation of the Constitution.

THE COURT: Okay. Sir, thank you.

MR. KESSLER: Your Honor, I'd just like to start with three minutes.

MR. SIMMONS: I think we should go to the individual motions.

MR. SAVERI: You finished, didn't you?

MR. KESSLER: But we just had an argument.

THE COURT: I know we did. I know what you're going to say. You've said it at least twice already. You're going to talk about that there has to be factual allegations and we can't go on the basis of the general allegation of a conspiracy. You're going to say there has to be individual arguments made against the individual allegations made against each of the defendants. That's a start. So I think I know what you're going to say.

MR. KESSLER: That's much what I going to say, but I'll save the rest. That's okay.

THE COURT: All right. Save the rest. Now, how many people do we have, eight?

MR. KESSLER: We submitted -- I don't know what you want to do. They submitted a proposed order. We submitted a proposed order.

THE COURT: This is your motion. You decide, you decide who's going to go.

MR. SIMON: Should we set some time limits?

THE COURT: That's what I want to do. I'm going to say 15 minutes per case.

MR. SIMON: Both sides.

THE COURT: Both sides 15 minutes.

MR. SAVERI: May I make an observation? In one

respect, all of these individual motions are coming up there is one argument that's going to cut across withdrawal from the conspiracy. That is an issue we want to address.

THE COURT: You'll get a chance. Go ahead, sir.

MR. SIMMONS: I appreciate it, your Honor, Judge Legge. I know it's been a long day. I have just a few slides I'd like to walk the court through and counsel here.

My name is Ian Simmons. I represent Samsung Electronics Corporation, Samsung Electronics of America. I'm a partner with O'Melveny & Myers.

Your Honor, in the first slide I have, there has been a lot of discussion about Iqbal today, and I think what I would urge to the court and I think what my colleagues have urged, co-counsel, is I would ask you to reject two pleading obfuscations that are apparent on the face of this complaint.

What are the two obfuscations? One is the retreating to CRT products. You've heard a lot about that. I'm not going to spend a lot of time on it. I do have a slide. That is plainly improper under Iqbal and Twombly.

What is the other obfuscation?

THE COURT: Why is it?

MR. SIMMONS: Well, your Honor, if you turn to the second slide right before you, CRT products encompasses at least four products. One is tubes, tubes used for televisions, tubes used for color monitors, televisions and computer monitors. That's four products. Not every defendant manufactured all four of those products or even most of them. For example, Samsung Electronics, my clients, did not manufacture tubes.

THE COURT: What you're saying they've got to plead what defendant made what product.

MR. SIMMONS: That's right. Let me quote from Iqbal. It's quite clear on this, and I'm reading from 129 Supreme Court at 1949. There must be enough, quote (As read): ...actual content allows the court to draw reasonable inference that the defendant is liable for the misconduct alleged, close quote.

We represent specific entities, and they are entitled to notice of who they conspired with when and with respect to what product. Retreating, generalizing up to the stratosphere at a level called CRT products, one of four things, is plainly improper. It's not noticed.

Let me direct your attention, your Honor, to --

I believe it's the fourth slide of the papers you have before you. There's no dispute in this litigation and the court will not find in either of complaints any allegation that the Samsung Electronics entities made CRT's or made tubes, because we didn't. We don't.

THE COURT: I have to look at the complaint here to see what it says against you. I can't carry that in my head.

MR. SIMMONS: I understand that. I'm just writing down propositions for you that when you go back and look at the complaint and when you reread the briefs, one our principal points is the reason the CRT product obfuscation is significant is because my clients never made and do not make and have not made tubes.

If you flip over the prior two slides, I won't walk you through it and on and on about it, but the only arguably factual averments in this complaint, and I agree with Mr. Montague, take the complaint in its entirety absolutely, because when you go through that complaint, you will see the plaintiffs saying there are glass meetings. They're talking about tubes there. There is this meeting. They're talking about tubes. They quote the Scott Hammond, Department of Justice press release. He's talking tubes. They talk about indictment. He's talking about tubes.

These defendants that I represent do not make and never have made tubes. How can we be dragged in? They try to drag it in by the first obfuscation CRT products all generalized upwards -- Mr. Kessler's fruit example -- and they'll also obfuscate it by just referring to everyone as Samsung.

Well, there is no dispute -- in fact the indirect plaintiffs in their paragraph 64 admit that Samsung Electronics only owns about 19.6 percent of SDI. SDI is an entity that made tubes. The United States Supreme Court in the Best Foods case, which we cite, says defendants are entitled to a presumption of independence. When you take that point and you couple it with Twombly and Iqbal, I respectfully submit to you, your Honor, that they have breached that presumption of independence and they don't get to do it by generalizing upwards and saying CRT products and generalizing upwards and saying, well, it's a family, it's a family of entities, Samsung.

Let's take paragraph 154, Mr. Montague -- I thought it was sort of interesting. Mr. Montague directs your attention to 154.

MR. SIMON: It's Montague.

MR. SIMMONS: Montague. Sorry. Pardon me. I'm from Canada. So I went to school in French Canada.

We would have pronounced that Montague.

MR. SAVERI: Well, we feel sorry for you.

MR. SIMMONS: Look at 154. When plaintiffs refer to a corporate family, it is to be understood that they are all engaged. Now, map that up against the allegations that Justice Kennedy and Supreme Court rejected in Iqbal, the allegations that Director Muller of the FBI, Attorney General Ashcroft knew about and directed. Those are plainly no go after Iqbal. Iqbal and Twombly are quite clear.

There are two sorts of things that should alert the court that are not entitled to any presumption of truth. One is legal conclusions posing as facts. You directed, you controlled. That's just -- direction and control is a legal point they're trying to make that somehow SEC controlled SDI when they don't have facts going to that point.

What is the other thing that's not entitled to an assumption of truth? Well, the other thing is the mere assertion. When I say a family, I mean a family is everybody. That is the exact opposite of what the Supreme Court and Twombly and Iqbal are saying.

It's interesting. Prior to Iqbal, we used to hear it said in the bar, well, Twombly only applies to parallel pricing, a narrow set of antitrust cases.

Where Iqbal came around and said, wait, wait, wait, not at all. It's a Rule 8 case. Each defendant needs to be shown. Remember Rule 8 uses the word show.

THE COURT: I hear your words. You're making the same points that have been made before, and that is, the plaintiffs, according to you, the plaintiffs must allege what manufacturer manufactured, must allege what each defendant did, not a corporate family, we don't pay any attention to legal conclusions.

MR. SIMMONS: Your Honor, let's turn to page 5.

THE COURT: I've heard it.

MR. SIMMONS: No, no, let's turn to page 5. There's a twist that I want to amplify. There's another twist which is the claims have to be plausible, and they have to be plausible as to each defendant.

THE COURT: That was apparent.

MR. SIMMONS: Well, no, SEC and SEA do not make tubes and haven't made them. So we've heard it said, well, someone conspired as to tubes to get the price of televisions up. I think when you go through the complaint you will not see -- I think Mr. Kessler is quite right and I won't repeat his very good arguments -- you will not see allegations saying anyone who made and sold televisions met to fix the price of televisions.

So then the theory is, well, tube makers. We're not tube makers. My defendants, my clients are not tube makers, but tube makers met to sort of get the price of televisions up. Well, if SEC wanted to -- SEC buys tubes. Is it plausible for us to consent to a conspiracy to charge my clients more just so I can jack up the price of televisions? I'd want my input lower and jack up the price of my televisions so I make more money, not less. Why would I go through the machinations of sort of controlling SDI to have them get the tubes up so I can charge for my televisions?

It's not plausible. It's facially illogical. I would want to do the reverse, and why wouldn't SDI just charge more for the Sonys of the world for their tubes and charge me less so I don't have to get the hit on the margin. The complaint alleges the opposite, and it's not plausible.

The Brennan and TFT case, Judge Illston is quite clear -- you even heard Mr. Montague say it. Judge Illston said there does have to be specific allegations as to each defendant, and the Brennan case is quite clear on that as well.

The final point I would sit down with, your Honor, absent any rebuttal, is that we have to take the presumption of independence seriously. It is the

plaintiffs' burden to allege.

THE COURT: I've heard it, I've heard it, I've heard it several times.

MR. SIMMONS: And the final point I will make, your Honor, is that if you look on the docket, SDI America certification of interested entities of persons pursuant to Local Rule 316, SDI has certified that Samsung Electronics owns not more than 20 percent of SDI stock. This whole concept, someone throws around a slide and says they're vertically integrated. Equity ownership --

THE COURT: Sir, I'd be willing to sit here and listen forever if you were to first person making these points and even if you were the second person.

MR. SIMMONS: Well, I think -- fair enough.

MR. SIMON: Your Honor, let me start. I'm only going to make the points I think haven't been made yet with the last point. Counsel says somehow SEC controlled SDI without any facts and what's on the docket is they had no control. I'd like to hand up to the court Samsung Electronics, that's SEC, one of the moving parties, 2008 public report which is publicly available to anybody who can get on the Internet, and what I'd like to direct your attention to is the fact that on the second page of this under equity method

investments, it says: Investments in business entities in which the company has the ability --

THE COURT: Page 2.

MR. SIMON: Second page right-hand column at the very bottom.

THE COURT: Yes.

MR. SIMON: It says (As read):

> Equity method investments. Investments in business entities in which the company has the ability to exercise significant influence over the operating and financial policies that are accounted for using the equity method of accounting.

And then if you flip to that two more pages back, you will find under Footnote 10 to their consolidated audited financial statements contained in their disclosures to the securities regulators, the first company listed there that they use equity method investments to account for is Samsung SDI, the one they're saying they have no control over. SEC says in their audited financial statements, in fact, they do control and have substantial influence over Samsung SDI, the tube manufacturer.

We have been accused of dissembling and saying things and playing games, but the fact of the matter is

counsel never told you that in his papers and it is right here in black and white, and that's their accounting principles unless they'd like to submit themselves to securities fraud allegations by somebody else.

Secondly, I think it is very important to tell you that there are nine Samsung defendants. Only two have moved, Samsung Electronics Corporation and SDI. Those are the only two that moved. Nobody else moved.

Number three, Samsung is the common denominator in all these cases. They are in DRAM, they are in SRAM, they are in every case in this district that involves a price fix in a high technology market, and they are the common denominator. And if Samsung can stand up here with a straight face and try to argue that somehow that this is not a plausible conspiracy that's been alleged, it's very doubtful that they would have any remaining credibility because why would any of these defendants go to meetings over the course of many years, submit themselves to potential criminal liability and prosecution if they in fact didn't intend to do something by meeting, and they did intend to do something, which is to fix the prices both of tubes and finished products. It would be irrational economically to say that the meetings occurred with no intent to do

what the meetings intended to do.

And lastly I will say that there is a number of times in the briefs that Samsung SDI defendants submitted where they say that somehow we have to define a market in this particular case. I would prefer you to Knevelbaard versus Kraft, the Ninth Circuit case I mentioned before, your Honor, 232 Fed. 3d. 979. (As read):

> When a per se violation such as horizontal price fixing has occurred, there is no need to define a relevant market or to show that defendants have power within that market.

Citing the FTC versus Superior Court Trial Lawyers Association, 1990, 493 U.S. 411.

If there is one defendant in this case that needs to stay in this case and that needs to compensate the victims of this price fix, it is Samsung for sure; and their arguments to the contrary should be to no avail, and they shouldn't be heard to telling you things about control and dominance which are simply false on the face of the record.

THE COURT: All right. One minute.

MR. SIMMONS: Thank you, your Honor. I'm frankly stunned to hear counsel say two things. First, that SEC -- other than SEC and SDI, no other Samsung

entity has moved. He's incorrect. SEC has moved and Samsung Electronics of America have moved. SDI has not moved.

THE COURT: That's just what I'm looking for in your motion where you identified where are the moving parties identified here.

MR. SIMMONS: Right on the cover, your Honor it's Samsung Electronics Co. Ltd. and Samsung Electronics America Inc.'s notice of motion and motion.

MR. SIMON: I said two out of nine. If I was mistaken about the entity, then I'm corrected.

MR. SIMMONS: You're accusing someone of falsehood. We can have just one person speak at a time.

THE COURT: What are you referring to, the individual motion?

MR. SIMMONS: Your Honor, the first statement Mr. Simon said is just flat wrong. He's accusing people of misrepresentation.

THE COURT: There are of your defendant entities, two who are moving.

MR. SIMMONS: Well, I don't represent the Samsung SDI. Sheppard Mullin does.

MR. SCARBOROUGH: I represent all of the Samsung SDI entities, your Honor, and none of those Samsung SDI those have made an individual motion to

dismiss. We've joined in the joint motions.

MR. SIMMONS: And as our motions have shown that the complaints corroborate, your Honor, Samsung SDI entities made tubes, Samsung Electronics entities, Samsung Electronics Corporation, Samsung Electronics Corporation of America do not. So when he says, so forget Samsung Electronics of America, I think it's important because he's accusing of people not trying to be precise. So I know he wants to be precise. So I correct that.

Second point, your Honor. It's interesting. He cites the SEC. This simply shows that we have an equity ownership interest. That's correct. 19.68 percent. This SEC filing is referred to and discussed in our briefing. We've put that before the court. An ownership interest is not sufficient under Twombly and Iqbal to drag us in by using the machinations of CRT products and Samsung. It doesn't cut the mustard, and I ask the court to reject it and dismiss the SEC entities.

If you want to give them leave to amend so they can pass Rule 11 to try to bring us in, they can do that.

Thank you, your Honor, for your indulgence.

THE COURT: Where do I find the SEC entities

identified? Where do I find the SEC entities?

MR. SIMMONS: They're identified in our briefing.

THE COURT: Okay. Which one?

MR. SIMMONS: In the opening brief, your Honor and in the reply.

THE COURT: Your individual brief.

MR. SIMMONS: Yes, our individual motions, your Honor. It is Samsung Electronics Corporation Ltd., which is a Korean entity, and Samsung Electronics America, Inc., which is a United States entity.

MR. KESSLER: Those are paragraph 58 and 59 of the direct complaint, your Honor. Those are the two. Those are the two entities.

THE COURT: Okay.

MR. SIMMONS: If you don't have any further questions, I will relieve you of my voice.

THE COURT: All right. Who's next?

MR. ALIOTO: On the indirect side, your Honor, with respect to Samsung, we have nothing to add. It's all in our brief. The allegations as to Samsung are summarized at page 42 of our brief. We have nothing to add other than that.

MR. SIMMONS: And just to clarify, your Honor, our brief covered both direct and indirect.

THE COURT: I know they did.

MR. SIMMONS: Thank you.

MR. SIMON: Your Honor, if you want to look at all the capacity paragraphs for the Samsung entities in the direct purchaser complaint, they appear between paragraph 58 and 62, as well as 63 through 66.

THE COURT: Okay.

MR. CURRAN: Judge Legge, my name is the Christopher Curran. I'm with the firm of White & Case, and we represent the Toshiba entities.

I'd like to make three brief points underscoring some of the arguments we've made in our individual briefs.

THE COURT: Let me hang on a minute. I'm getting my paper mixed up here.

MR. SIMON: Let me give it to you again. In our direct complaint, the Samsung allegations with respect to each of the entities are between paragraph 58 and 66.

THE COURT: All right. Go ahead.

MR. CURRAN: Your Honor, moving from Samsung to Toshiba.

THE COURT: I understand. Shift made.

MR. CURRAN: All right. Thank you. Three brief points. They correspond to the Roman numeral

heading in our briefs, both our moving papers and our reply briefs.

First point, when we analyzed the complaints, both the direct purchaser consolidated amended complaint and the indirect purchaser consolidated amended complaint, first we looked at the generalized allegations against the defendants and we observed and we pointed out in our briefs to you that many of those allegations have simply no bearing upon Toshiba. Let me give you some examples. You can see them recited in full in the briefs.

The plaintiffs in both complaints allege that certain defendants have been investigated by the government in this matter and at least one defendant has had executives who have pleaded guilty. Those observations in the complaints have no bearing on Toshiba. Toshiba, no one has been indicted from Toshiba, no one has pleaded guilty, and, in fact, we haven't even received a grand jury subpoena from the Department of Justice.

Now, I think a few moments ago one of the counsel for the plaintiffs said it was very important to make observations about who's been indicted, who's been investigated and even allegations about other cases.

All of those allegations in the complaint have

no bearing on Toshiba. Toshiba has not itself, nor any of its executives, been indicted or pleaded guilty in any of the others matters, DRAM, SRAM, Flash, et cetera, et cetera.

Interestingly perhaps, the only communication that the Toshiba entities have received from the Department of Justice in this matter is for information as a potential victim because Toshiba entities were purchasers of CRT's.

So a lot of what your Honor heard today about how the Department of Justice's public statements, including statements by Scott Hammond, the Deputy Assistant Attorney General for criminal enforcement, his statement about damage on U.S. customers and so forth, none of that has any bearing on Toshiba.

Other generalized allegations in the complaints that have no bearing. There is allegations with a oligopoly and how that industry is ripe for price fixing and that kind of thing. Interestingly, in the indentification of the oligopolists in that oligopoly in the complaint, Toshiba is not listed. Its market share is too small to be in that company.

There are also allegations about participation in trade association meetings and so forth. Again, there are no allegations that Toshiba entities or their

executives participated in these trade associations.

So we see no linkage between those generalized sweeping allegations and the Toshiba entities. So what we did beyond that, your Honor -- and this is moving to the second point I'd like to make -- we then looked at the specific allegations naming the Toshiba entities, and as you may know, in today's computerized world it's fairly simple to do a search, put in Toshiba and do a search and see the paragraphs that come up. We did that.

THE COURT: I wish I had that.

MR. CURRAN: You do. I'm sure you do, your Honor. If fact, if you'd like we could provide you with the excerpts.

THE COURT: I'll give that burden to my case manager.

MR. CURRAN: I recommend it, your Honor. And what we saw was certainly there are allegations identifying who the defendants are and certain other allegations identifying benign activities taken over the years, but I think I'm fair to say -- and if I'm wrong, I'm sure the plaintiff counsel can clarify this when they rebut my comments -- but I think there are only two paragraphs in each of the complaints that have substantive allegations again the Toshiba entities, and

I'll identify those for you, your Honor.

In the direct purchase plaintiffs' consolidated amended complaint, paragraphs 171 and 172. And your Honor, of course, can look at those. I'll make a couple observations about them. Again, I'm starting with the direct. It's paragraph 171 and 172.

I don't want to belabor this, but let's take a quick look at those paragraphs and then we'll consider briefly whether they satisfy Twombly, Iqbal and Kendall. Paragraph 171, Toshiba through TC and TDT participated in over 50 bilateral and group meetings between 1995 and 2003 in which unlawful agreements as to inter alia price output restrictions and customer and market allocation of CRT products occurred.

Okay. A couple of observations because, your Honor, frankly, I think that sounds an awful like the allegation in Twombly. It's got a broad period here, an eight-year period. It's not identifying people, not identifying times of specific meetings. It's just very generalized, conclusory language.

Now, it does have 50, and I think we've heard a lot today about the plaintiffs talking about how their complaints are so impressive because they identify the number of meetings. Well, that's kind of an empty argument when they don't identify more specifics about

that number. But we have no idea who's alleged to have gone from the Toshiba entities, what's alleged to have occurred; and, frankly, we are a little baffled by the repeated use of the passive voice here, that the Toshiba entities participated in meetings in which unlawful agreements were reached.

That's an odd way to make an allegation of price fixing, particularly when Twombly in 2007 has said that in an antitrust conspiracy case, the most important thing is the agreement, an allegation showing that the defendant in question participated and was a party to the agreement. So we just think that's an odd way to turn a phrase in a price fixing case.

That paragraph continues: These meetings occurred in Taiwan, Thailand and Indonesia. Again, I guess the plaintiffs think that that's terrific specificity, but our view is without identifying who went where when and other details that's kind of empty specificity. And then they go on to say Toshiba never effectively withdrew from this conspiracy.

Again, 172 isn't much better. There it just identifies the other Toshiba entities and it says that they were, and again passive voice, they were represented at those meetings.

We don't think that's enough notice to us to

know how to go about defending ourselves. We don't they identifies the grounds and we don't think that kind of bare factual assertion gives rise to a plausible claim against Toshiba.

I won't belabor this, but you'll see there's a couple further sentences in 172.

THE COURT: I see.

MR. CURRAN: And then in the indirect purchaser plaintiffs' complaint there are very similar allegations in paragraph 177 and 178. There instead of saying a specific number, 50, they say several glass meetings and multiple bilateral discussions. Okay. Again, we don't think that's a specific number under Twombly, Iqbal, or Kendall. In fact, we think those allegations are exactly what those cases were condemning because they are formulaic recitations. They're conclusions. And they don't have sufficient factual information for us to begin to prepare a defense.

And, your Honor, there hasn't been enough focus on this yet today. Iqbal and, before that, Twombly, they're not merely pleading standard cases. They are pleading standard cases, and I think it's clear Conley versus Gibson is now retired, but what's so important about those cases is, and they talked about it expressly, they are imposing on district judges and

those who operated with the delegation of district judges a gatekeeper role on discovery. Twombly is express about it.

THE COURT: I know.

MR. CURRAN: It says the doors to discovery are not open until the pleading standards of those cases are met, and our position, of course, is that with respect to these meager allegations against the Toshiba entities they're not satisfied.

Now, the third point and the third Roman heading in our briefs deals with withdrawal. Both complaints here expressly allege that Toshiba entered into a transaction in 2003, 2002 and 2003, which was consummated prior to that magic date of November 26, 2003. And the specific allegation is that the Toshiba entities transferred their entire CRT business into a new corporation, MTPD, which at least its original name was Matsushita Toshiba Picture Display. I believe the name has been subsequently changed as Toshiba's interests completely dissolved.

So our contention, your Honor, is that that transaction by which the Toshiba entities exited the CRT industry constitutes as a legal matter withdrawal and abandonment of any conspiracy they were possibly in with respect to CRT business.

Now, in the opposition briefs that your Honor received, I don't think there was a broad-based attack on that proposition, but instead the plaintiffs pointed out that -- they questioned whether it was withdrawal and abandonment given that Toshiba retained an ownership interest in that new corporation, okay, because you see Matsushita and Toshiba contributed their CRT businesses into a new company and they retained shareholder ownership. So Toshiba was a minority shareholder, 33 percent in the new entity. So the plaintiffs are taking the position, ah ha, that shows it's not withdrawal and abandonment.

Our position is the plaintiffs are mistaken on that point because under Ninth Circuit precedent and specifically the Lothian case, which is cited in both parties' briefs, we believe the proper test is whether or not the company in question contending it abandoned and withdrew from a conspiracy continued to have control and operational management over the business in question. And we believe that Toshiba, as the minority shareholder, and with respect to complaints where there is no allegation whatsoever that Toshiba had any continuing role in the operation of the business, that those facts establish as a legal matter withdrawal and abandonment of any conspiracy they may have been in.

I hasten to add, of course, we deny any participation in any conspiracy whatsoever, but nonetheless that's a legal argument.

Thank you, your Honor.

MR. SPECKS: Your Honor, Gary Specks with Kaplan Fox on behalf of the direct purchasers.

Toshiba spends innumerable pages of its briefs trying to distinguish plaintiffs' allegations from the allegations that we make against other defendants. The problem is that they are attempting to draw these distinctions that are utterly irrelevant to the questions as to whether or not our complaint states a claim against them.

For example, they argue that they weren't indicted, they were never subpoenaed, they haven't pled guilty, there is no criminal investigation against them.

THE COURT: Get to where you're making the charges against them.

MR. SPECKS: I don't have their briefs in front of me.

THE COURT: Your briefs. Where are your allegations against the Toshiba entities?

MR. SPECKS: We haven't alleged that. They are alleging that we make that allegation against other defendants, but we haven't made it against them.

THE COURT: I'm bypassing your entire point.

MR. SPECKS: Pardon me?

THE COURT: I'm bypassing your entire point.

MR. SPECKS: Okay. I understand. Paragraph 154, 171 and 172 are the specific allegations against Toshiba which alleges their participation and representation at the conspiratorial meetings. The conspiratorial meetings that they attended are described in 19 paragraphs of our complaint, paragraphs 134 to 153. Those paragraphs describe the nature, the organization, the attendees, the locations and the substance of the conspiratorial meetings they attended.

THE COURT: Okay. I'll read them.

MR. SPECKS: Now --

THE COURT: What about withdrawal?

MR. SPECKS: With respect to withdrawal, the Ninth Circuit has said that in order to establish withdrawal from a conspiracy the defendant must either disavow the unlawful goal of the conspiracy, affirmatively act to defeat the purpose of the conspiracy, or take definitive, decisive and positive steps to show its disassociation from the conspiracy.

Now, Toshiba argues that simply because it formed this joint venture with one of its co-conspirators, the joint venture also being a named

defendant and co-conspirator in the case, that somehow that constituted a withdrawal from the conspiracy.

The joint venture, first of all, concerned only CRT's. There is no contention by Toshiba that they ever withdrew from the business of manufacturing products containing CRT's, electronic products containing CRT's. So to the extent they're suggesting to the court that they somehow withdrew from the manufacture and sale of all the products that were the subject of the conspiracy we allege in this case, it's simply not so. So in that sense they certainly can't contend that they withdrew from the conspiracy by retiring from the business.

They also maintained a shareholder interest in this company, this joint venture company which was in the business of manufacturing and selling CRT's. Under the Reisman decision in the Ninth Circuit, that alone is enough to defeat their claim of withdrawal even assuming this were only a CRT conspiracy. So their withdrawal contention really has little, little merit.

Now, I would refer your Honor, rather than going into detail on the law which holds that the mere sale or resignation, the mere sale of a business or resignation from a business is not enough alone to establish withdrawal as a matter of law, I would refer your Honor to the case law that we discussed at pages 49

to 53 of our joint opposition. I'm not going to waste the court's time by repeating what's in there.

I would also like to point in a procedural context of a motion to dismiss Toshiba is the one who has the burden of demonstrating that the allegations of the complaint, in other words, the face of the complaint, established their withdrawal as a matter of law. The fact of the matter is that withdrawal is a very fact-intensive issue which can rarely be determined on the face of the pleadings, and there is certainly nothing that we allege on the face of our complaint that establishes Toshiba's withdrawal as a matter of law.

If your Honor has any questions, I'd be happy to answer.

THE COURT: No. Mr. Alioto, do you want to say anything for the indirect?

MS. RUSSELL: Your Honor, Lauren Russell appearing for the indirect plaintiffs.

Your Honor, there seems to be an inconsistency running through the defendants' presentations here. On one hand, they say that Continental Ore is still good law and the complaint should be read as a whole. On the other hand, we have Toshiba saying that you should only look at two paragraphs of our complaint as to the allegations against them.

That is not the law. Iqbal and Twombly do not hold that. Iqbal and Twombly are pleading cases. They say that you can -- you may disregard conclusory allegations.

We have pled far more than conclusory allegations here. We have allegations regarding the detail of the glass meetings, the different levels of glass meetings and who attended. And when you read all of that together, as we describe in --

THE COURT: Could you give me the paragraphs?

MS. RUSSELL: The two paragraphs of our complaint are 177 and 178. Those are the two paragraphs that Toshiba refers to, but Toshiba refers ignores many of paragraphs in our complaint.

THE COURT: What paragraphs do you want us to read?

MS. RUSSELL: We describe those in pages 40 to 41 of our brief. Specifically our allegations that the top level meetings --

THE COURT: Give me paragraphs of your complaint to read because that's what I have to measure this against.

MS. RUSSELL: Okay. So the allegations regarding the top meetings are in paragraph 146 of our complaint and read together with paragraph 177, as

Continental Ore requires, we believe that a reasonable inference you may draw therefrom is that Toshiba Corporation as the parent company attended those top meetings.

THE COURT: Okay. 146, 147, 77, 78. That's all I need. I'll read it.

MS. RUSSELL: All right. Thank you, your Honor.

MR. KESSLER: I think Panasonic is next.

MS. KERN: Can I be heard for 30 seconds, your Honor, just on the withdrawal issue?

THE COURT: On the what?

MS. KERN: On the withdrawal issue. I'll be mercifully brief.

One, withdrawal from the industry is not the same as withdrawal from the conspiracy. Withdrawal is subject to tolling because of the fraudulent concealment, and that's that Morton's case that we discussed in our brief. And, finally, even assuming withdrawal, the defendants who withdrew would still be liable for the acts of their co-conspirators before withdrawal, and that's also Morton's.

And other than that, I'll stand on our briefs. Everything is discussed in there, including the Lothian case and the Reisman case. Just briefly on Lothian, the

issue here is whether the defendant maintained a financial interest, and that's certainly a question of fact. Thank you.

THE COURT: Okay.

MR. CURRAN: Your Honor, with just two rebuttals, with two, I wasn't going to get up, but with three I figure I will.

Very briefly, first of all, all the other allegations that were referred as supporting the claims against Toshiba, they don't even mention Toshiba. Those are generalized allegations that defendants did such and such.

THE COURT: I'll read it.

MR. CURRAN: With respect to withdrawal and abandonment, the Reisman decision from 1969 predates modern law on antitrust withdrawal. It predates U.S. Gypsum by the U.S. Supreme Court and it predates by a couple decades the Lothian case I referred to.

This association is sufficient for withdrawal or abandonment. You don't have to defeat or disavow the conspiracy.

MR. SIMON: Your Honor, before Mr. Kessler gets up, I gave you the capacity paragraphs on the Samsung entities because I thought that was the question. I didn't give you the charging paragraphs. Do you mind if

you just go back and I'll give you those real quickly so when you read them you can read them all together? This is on direct purchaser complaint on Samsung.

THE COURT: Yes, I understand.

MR. SIMON: Paragraph 130, paragraph 186, paragraph 154, paragraph 166, paragraph 167 and paragraph 112 along with the ones I gave you. We were going so fast there, I forgot to give you those.

THE COURT: All right. Who's next?

MR. KESSLER: I am, your Honor. Your Honor, there are currently three Panasonic entities left in the case. We're moving individually on behalf of only two of them, which is Panasonic of North America and Panasonic Corporation. We are not moving on behalf of MTPD.

THE COURT: I'm sorry. Panasonic of North American and Panasonic.

MR. KESSLER: Corporation. We are not moving on behalf of MTPD. MTPD is the company you heard that was the joint venture formed by Toshiba and Panasonic in which both companies put their CRT business and eventually Panasonic Corporation bought a hundred percent of the stock of MTPD later on in 2006 in terms of that. So that entity we're not moving on behalf of except as part of the joint motion.

There are other Panasonic entities listed, but they've been dismissed, even though they're still in the complaint. Just so your Honor knows, for example, the direct complaint, paragraph 49, PACEC is not a separate company and it's been dismissed from the complaint. That's in the direct complaint, paragraph 49. And also defendant Matsushita Electronic Corporation Malaysia in 47 is out of the complaint. That's a defunct entity.

MR. SAVERI: Those were dismissed pursuant to stipulation; is that correct?

MR. KESSLER: Yes.

THE COURT: Let me have their names again?

MR. KESSLER: The entity in 49, PACEC. This is in the direct complaint. And the entity in paragraph 47 Matsushita Electronic Corporation Malaysia. They have been dismissed from the complaint pursuant to stipulation.

THE COURT: Okay.

MR. KESSLER: So focusing then on the two entities that we are moving on. The first one is Panasonic North America. Panasonic North America is simply a sales company. So it neither manufacturers CRT's or manufactures televisions. It buys televisions, for example, and then resells them to retailers. Okay?

There are virtually no allegations about

Panasonic North America in either the direct complaint or the indirect complaint other than identify it in the paragraph that identifies it as a party. Instead, what they try to do is use that paragraph which exists in each complaint saying every member of the corporate family is represented by anybody. So when they make allegations about other Panasonic attending meetings, they say, oh, well that pulls in PNA because you were a member of the corporate family.

For reasons your Honor is aware of, that tells PNA nothing, it gives us no notice of any specific participation by PNA, nor does it make any sense that PNA would participate in such a conspiracy because all it did is buy televisions and resell televisions. It could not benefit in any way from the alleged CRT conspiracy, and for the reasons which I won't repeat again, there is nothing to indicate a television conspiracy in which PNA or anyone else participated and there is no allegation of that as a factual matter in the complaint.

Now, what do they say about that? Well, what the direct purchaser plaintiffs say is they first point to paragraph 144 and 146. That's the first thing they say. The first point to note about 144, 146 is PNA is not mentioned in either of those paragraphs. Instead,